October 16, 2003

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 01-338, 96-98, 98-147, 01-117

Dear Ms Dortch:

Attached are comments of the Association for Local Telecommunications Services (ALTS) for filing in the above-captioned proceeding.

Sincerely,

/s/

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 01-338
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose"	)	CC Docket No. 01-117

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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SUMMARY

The Commission must not alter the pick-and-choose rule implementing section 252(i) of the Telecom Act. The ILECs still wield monopoly control over essential, bottleneck facilities and insurmountable bargaining leverage over their wholesale clients, who also happen to be their chief rivals for end-user retail customers. Until a competitive wholesale market emerges or can otherwise be replicated by proper regulator-designed incentive and penalty structures, or until CLECs otherwise gain equal bargaining leverage with their ILEC wholesalers/rivals, the CLECs need continuation of the rights granted by Congress and FCC rules implementing section 252(i).

Underlying the proposed modification to the pick and choose rules is the assumption that ILECs need and want CLEC wholesale customers to fill their excess network capacity. If this were the case, ILECs would have enough incentive to negotiate more beneficial terms under the current regime and provide those terms to all CLECs in order to increase their wholesale business. Because market reality reveals that ILECs are not interested in cultivating their wholesale business with CLECs, abandoning the pick and choose safeguards at this time would not provide additional incentive for the ILECs to deal fairly with CLECs. On the other hand, abandonment of, or otherwise altering, the pick-and-choose rule would allow ILECs to negotiate sweetheart deals with preferred carriers and structure those contracts in such a way as to prevent other carriers from opting into them. ALTS submits that to the extent ILECs are able, and willing, to perform at higher standards, they should do so for all carriers on a nondiscriminatory basis, not on the basis of their own subjective determinations of which carriers are worthy

of that higher level of service. The availability of "unique" carrier-to-carrier agreements would be meaningless as a means of leveling bargaining power unless they were available on an unbundled, disaggregated basis.

Given the Act's express requirement that any Section 252 agreements be available to non-party requesting carriers on a disaggregated basis, this statutory requirement should continue to be clearly stated in the Commission's Section 251 regulations. Abandonment of this simple and obvious requirement would be a "green light" for gamesmanship by the ILECs. Such opportunity for gamesmanship would pointlessly consume scarce industry resources and could destabilize the intercarrier negotiations process.

ILECs have an obvious anti-competitive incentive to discriminate against CLECs when providing UNEs. ILECs have incentive to raise their rivals' costs, to decrease the quality of rivals' service offerings, and to increase time to deploy competitive services. Preservation of the pick-and-choose rule will enable CLECs to guard against such discrimination.

To date, no party has proposed an alternative interpretation of section 252(i) that could establish incentives to engage in give-and-take negotiations while maintaining effective safeguards against discrimination. ALTS remains open to the notion that such incentives may one day exist; however, empty statements from the Bells that they would engage in such give-and-take negotiations belies the reality of the current marketplace in which the Bells have stalled, loopholed, and otherwise gamed CLECs literally to death via one-sided, protracted negotiations processes.

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COMMENTS OF THE
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby files its comments in the above-referenced proceeding in response to the Commission's Further Notice of Proposed Rulemaking in CC Docket No. 01-338.[1] In the *Further Notice*, the Commission seeks comment on whether it should alter its interpretation of section 252(i) to promote more meaningful commercial negotiations. For the reasons discussed below, ALTS urges the Commission not alter its interpretation of section 252(i) at this time.

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed

I. There is no justifiable basis for reversing or relaxing the Commission's original pick and choose requirement.

Section 252(i) of the Act provides that a "local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under [Section 252] to which it is a party to any other requesting carrier upon the same terms and conditions as those provided in the agreement."[2] Thus, it is manifest that third-party carriers are expressly authorized to order "any interconnection, service, or network element" provided in a Section 252 agreement. In order to fully protect this clear statutory right of third-party carriers to order from Section 251 agreements on an unbundled or disaggregated basis (*i.e.*, order any portion of an agreement implementing particular subsections or paragraphs of Section 251(b) or (c)), the Commission must continue to incorporate an express pick-and-choose requirement in its regulations.

Regardless, the FCC has tentatively concluded that a modified approach to the existing pick-and-choose rule might better serve the goals embodied in section 252(i) and sections 251-252 generally. Specifically, the Commission has tentatively concluded that limiting carriers' opt-in rights to entire agreements (subject to satisfaction of the SGAT condition) would be consistent with the text of section 252(i), which requires only than an incumbent LEC make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those

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Rulemaking, FCC 03-36, paras. 713-729 (rel. Aug. 21, 2003) ("*Further Notice*"). The entire Order shall be referred to herein as *the UNE Triennial Review Order*.

[2] 47 U.S.C. § 252(i).

provided in the agreement.[3] The Commission now reasons that provision of such interconnection, service, or network element through wholesale adoption of an agreement or piecemeal adoption of SGAT provisions would satisfy section 252(i).

ALTS contends that there is neither legal nor factual support for reversal of the Commission's original interpretation of section 252(i). ALTS contends that legal considerations compel retention of the Commission's original interpretation of section 252(i). The Commission has already decisively concluded that "the text of section 252(i) supports requesting carriers' ability to choose among individual provisions contained in publicly filed interconnection agreements."[4] This conclusion was underscored by Justice Scalia's unanimous Supreme Court opinion on this issue: "The pick-and-choose rule 'tracks the pertinent language almost exactly' and is the 'most readily apparent' reading of the statute."[5] Given that a reversal of an agency's existing statutory interpretation is reviewed under the much more demanding *State Farm* standard, not *Chevron*, the proposed change could not conceivably withstand judicial review. It is absurd that in one of the only instances in which the highest court in the land has made a final binding determination as to the legal correctness of a Commission ruling, the FCC is considering revising that explicitly sanctioned conclusion.[6]

As the preeminent trade organization representing facilities-based CLECs, ALTS successfully advocated the interpretation of section 252(i) that was adopted by the Commission in 1996 in its *Local Competition Order* and later vindicated by a unanimous

[3] *Further Notice* at para. 728.
[4] *Local Competition Order* at para. 1310.
[5] *Iowa Utilities Board* at 396.
[6] The *Further Notice* makes almost no attempt to conduct a forbearance analysis under Section 10, and ALTS also believes that there is no sound rationale to abandon pick-and-choose consistent with the mandate of Section 10.

Supreme Court. Nothing in the telecom marketplace has changed since 1996 to justify relaxation of the pick and choose rule. To the contrary, as the Bells continue to grow their long distance market share and become direct competitors for bundled service offerings, while simultaneously being relieved of many of their 251(c) wholesale obligations, it becomes all the more essential for CLECs to have effective bargaining leverage in negotiating interconnection agreements with the ILECs. Section 252(i) is an essential tool for ensuring the ability of CLECs to negotiate with a reluctant monopolist. Thus, ALTS continues to support the FCC's original interpretation of section 252(i) as an essential protection against discriminatory interconnection contracts despite any burden it might impose on negotiations when compared to an "all or nothing" interpretation.

There is no doubt that altering the pick-and-choose rule will set the industry on a new course of protracted litigation, during which time intercarrier negotiations will be stymied. The only parties that would benefit from such confusion would be those that control most of the consumer base and bottleneck facilities – the ILECs. Everyone else, including captive consumers, would suffer while waiting for the rules to be digested, litigated, and ultimately understood and incorporated into the intercarrier negotiations process. The Commission should not push further uncertainty into the market, particularly in light of the new UNE rules recently adopted.

II. The Current Pick and Choose Rules Do Not Impede Negotiations, But Instead Ensure Nondiscriminatory and Fair Negotiations.

The Commission seeks comment on the extent to which the pick-and-choose rule impedes meaningful negotiations. The Commission tentatively concludes that the pick-

and-choose rule discourages the sort of give-and-take negotiations that Congress envisioned. However, it is not the existence of pick-and-choose that "impedes meaningful negotiations." Rather, it is the insurmountable bargaining leverage that ILECs wield in the negotiation process and their refusal to negotiate in good faith with CLECs that impede meaningful negotiations. Negotiations between ILECs and CLECs are not negotiations among parties with equal bargaining power, and the ILECs feel no compulsion, beyond the anemic threat of possible regulator enforcement of sections 251 and 271, to negotiate fair and meaningful agreements with CLECs. Instead of increasing the ILECs' incentives to fairly negotiate, abandonment of the pick-and-chooses rules opens the door for further discrimination.

While the current rules may "inhibit innovative deal making" between two carriers, as Mpower had formerly argued in its disavowed and withdrawn *FLEX Contracting Petition*,[7] such "deal making" is not necessarily the best outcome for competition or the industry as a whole. The Commission has taken such pains to note in other proceedings that its policies are intended to encourage competition, but not specific competitors. Changing the pick and choose rules, however, would do just that by allowing certain competitors to obtain preferential treatment at the cost of other competitors. Such a result does not benefit competition as a whole.

[7] ALTS reiterates and incorporates by reference its position on pick-and-choose filed in response to the Mpower Petition for Forbearance and Rulemaking. See Reply Comments of ALTS in CC Docket No. 01-117 (filed May 25, 2001) ("*FLEX Contracting Petition*").

ALTS notes that two days ago, Mpower withdrew its *FLEX Contracting Petition*, stating that "current telecommunications industry circumstances do not provide adequate incentives for the May, 2001 Flex Contract proposal, as originally envisioned by Mpower, nor the filing of a Statement of Generally Available Terms & Conditions discussed in the Commission's Notice of Proposed Rulemaking released on August 21, 2003, to work satisfactorily. In short, Mpower concludes that under current industry conditions, that a Flex Contract regime will not promote more flexible and open negotiations between incumbent LECs and competitive LECs than exist under existing pick-and-choose interconnection rules." *Letter from*

The unequal bargaining power of ILECs and CLECs has been a serious practical barrier to negotiated interconnection agreements for the simple reason that CLECs are captive consumers unable to find another wholesale provider and ILECs are an unwilling provider forced to provide services to their competitors. The *UNE Triennial Review Order*, by eliminating CLEC access to certain UNEs, most notably access to the Fiber-to-the-Home and the packet functionalities of hybrid loops, eviscerates even further any bargaining leverage an individual CLEC may have had to forgo access to broadband loops in exchange for better treatment on other matters.

Rather than abandon the pick-and-choose rules, the industry and consumers would be better served if the Commission took even minimal steps to replicate a competitive marketplace where one does not yet exist. To do so would require one simple, relatively unobtrusive, action by the Commission – obligate the ILECs to bargain in good faith over inclusion of ordinary business rules in interconnection agreements.[8] In

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Douglas G. Bonner, Counsel for Mpower Communications Corp., to Marlene Dortch, Secretary, FCC, in CC Docket Nos. 01-117, -1-338, 96-98, and 98-147 (filed October 14, 2003).

[8] In ALTS' initial comments to the Commission in the first NPRM on local competition back in 1996, ALTS asked the Commission to require the ILECs to bargain in good faith over inclusion of ordinary business rules, or self-executing performance metrics, in interconnection agreements. When the FCC declined to require such good faith negotiation, ALTS submitted a simple reconsideration petition, upon which the FCC has not yet acted. *ALTS Petition For Clarification And Reconsideration*, CC 96-98, (filed September 30, 1996). ALTS renewed this petition two years ago when the FCC indicated that all dated petitions would be denied unless explicitly renewed. *Letter from Jonathan Askin to Dorothy Attwood in response to the Commission's July 11, 2001 Public Notice, DA 01-1648 regarding refreshing the record on petitions for reconsideration of the Local Competition First Report and Order in CC Docket No. 96-98* (filed September 10, 2001). ALTS has consistently renewed this request in multiple contexts in an effort to ensure that the ILECs treat the CLECs as valued wholesale customers where monopoly conditions provide no such ILEC incentive. *See*, *e.g.*, Letter from Jonathan Askin to Chairman Powell and Commissioners, in CC Docket Nos., 01-318 and 01-321, dated June 9, 2003.

ALTS was encouraged when the Commission issued notices of proposed rulemaking two years ago proposing a limited set of metrics and standards for the provisioning of network elements and special access. Notice of Proposed Rulemaking, *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318 (rel. Nov. 8, 2001); Notice of Proposed Rulemaking, *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321 (rel . Nov. 16, 2001). Like an obligation to negotiate in good faith over inclusion of self-executing performance metrics and standards, a Federally-established set of self-executing metrics and standards would go a long way in compelling reluctant monopolists to behave like willing wholesalers.

a genuinely competitive market, such business rules are routine, whereas a monopolist provider feels no compulsion to include such standard contract provisions. The ILECs uniformly object to the inclusion of such ordinary business rules in their contracts. Because the CLEC has no alternative supplier of wholesale facilities available to it, the CLEC must accept the ILECs' terms as a condition of reaching agreement on the interconnection agreement. Until ILECs are compelled by natural competitive market forces to negotiate such ordinary business rules, the FCC must fill the void caused by the ILEC's overwhelming market power and control over bottleneck facilities and the ILECs' obvious reluctance to deal fairly with their competitors/wholesale customers. Obligating the ILECs to so negotiate in good faith would of course require some oversight by a neutral party in the likely event that the ILEC still feels little compulsion to adhere to a Commission mandate to bargain fairly with its CLEC customers and rivals.

ALTS, however, must reiterate that requiring the ILECs to negotiate over the inclusion of ordinary business rules is insufficient protection in the absence of the pick-and-choose rule. Only the pick-and-choose provisions ensure that new entrants, particularly small CLEC that cannot realistically be expected to negotiate, arbitrate and litigate every provision of every interconnection agreement, are afforded reasonable access and interconnection rights.

Carriers are finally becoming accustomed to the intercarrier negotiations process as it now exists. Now is not the time to disrupt that process. Particularly given the precarious nature of the industry and the negotiation tensions between ILECs and

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ALTS, at the time, believed that a sufficient record already existed to allow the Commission to adopt such metrics and standards without additional comment. Nevertheless, ALTS filed extensive additional comments in response to those notices, detailing the ILECs' provisioning problems and delays that have made it extremely difficult to compete on a level playing field with the ILECs.

CLECs, any further tipping of bargaining leverage in favor of the ILECs that already wield inordinate bargaining power, could destabilize the intercarrier negotiations process, not to mention the competitive marketplace. As the Commission recognized in its *Local Competition Order*,[9] it is CLECs -- not ILECs -- that stand to lose the most from inefficient or delayed negotiations. Given the ILECs' lack of economic interest in effective negotiations, their expressions of concern over the effect of section 252(i) on negotiations have no more credibility than the opinion of foxes concerning the proper construction of henhouses. Nor does any aspect of the *UNE Triennial Review Order* implicate the original interpretation of section 252(i). To the extent that "lack of impairment" findings ultimately remove the unbundling requirements for some network elements, CLECs and ILECs will be required to negotiate outside of the section 252 bargaining process for access to those or similar ILEC services. Where CLECs are found to be impaired without certain UNEs merely underscores the ILECs' market power over these remaining UNEs, and thus the continued need to preclude antidiscriminatory interconnection contracts for those UNEs.

In the *Local Competition Order*, the Commission correctly recognized that, if competitive carriers were required to opt into an entire agreement rather than individual provisions, ILECs would insert "poison pills" into agreements to make them unsuitable for adoption by third parties.[10] Since most of the ILECs are fighting tooth and nail to prevent agreements from being shared on an unbundled basis, as now required by Section

[9] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order at para.1313 (1996) ("*Local Competition Order*").
[10] *Local Competition Order* at para. 1312 ("failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement.").

252(i), it would be a relatively simple task without the pick and choose rules for ILECs to draft agreements that can only be used by a narrow competitive segment, proclaim their "compliance" with the Act, and then slam the door on everyone else. The fact that an ILEC enters into an agreement with one or a few competitors does not demonstrate its commitment to full competition. Thus while some "favored" competitors may benefit by relaxation of the pick and choose rules, many others would face discriminatory treatment and could be effectively locked out of the market. In this way, the ILECs could effectively control the amount and type of competition they may face.

To date, no party has proposed an alternative interpretation of section 252(i) that could establish incentives to engage in give-and-take negotiations while maintaining effective safeguards against discrimination. ALTS remains open to the notion that such incentives may one day exist; however, empty statements from the Bells that they would engage in such give-and-take negotiations belies the reality of the current marketplace in which the Bells have stalled, loopholed, and otherwise gamed CLECs literally to death via one-sided, protracted negotiations processes.

III. Filing of an SGAT Is Not a Suitable Substitute for the Current Pick and Choose Rules.

The FCC has proposed in the *Further Notice* that, where an ILEC files and obtains state approval for a SGAT, the current pick-and-choose rule would apply solely to the SGAT, and all other approved interconnection agreements would be subject to an "all-or-nothing" rule requiring carriers to adopt the interconnection agreement in its entirety. Under the proposal set forth in the *Further Notice*, once the ILEC met the

SGAT condition, the ILEC would be free to negotiate more customized agreements with the knowledge that third parties would be limited to opting into the entirety of such agreements, rather than selecting individual terms without making any trade-offs.

This "SGAT as a backstop"-concept is entirely inadequate to guarantee CLECs fair access to the Bell network, let alone other ILECs not specifically obligated to file SGATs. Nor will the ability to pick and choose from provisions in the SGAT give CLECs the necessary bargaining leverage to negotiate with the Bells. Most of the SGATs were, by and large, unilaterally proposed by the Bells and were quickly rubber-stamped and adopted by state commissions without necessary debate and certainly without the understanding that these SGATs would someday and somehow supplant the 252(i) rights and obligations. As the FCC has made clear in multiple 271 reviews, the SGATs have generally been inadequate even to satisfy the minimal 271 obligations.

SGATs do not include the necessary details that can only be covered in interconnection agreements. SGATs certainly do not include ordinary business rules, provisions typically incorporated into contracts in a competitive market. CLECs need a private right of action to enforce provisions specifically set forth in their interconnection agreements, above and beyond any right afforded by an alleged violation of an SGAT provision. Furthermore, many CLECs offer service across state borders, across regions, even across the country. Reliance on state-specific SGATs, does nothing to protect the rights of CLECs with regional or national business strategies. The ability to negotiate contracts using the pick-and-choose process and that cut across state borders is essential to these carriers.

The Commission also seeks comment on whether the "SGAT as a backstop"-concept would be workable for all classes of carriers, including smaller CLECs that lack the resources of larger competitors. As the trade association that represents the small, stand-alone facilities-based CLECs, ALTS is convinced that abandonment of the pick-and-choose rules would work against small CLECs with even less bargaining power than the large IXCs attempting to gain access to local markets. Small CLECs do not have the resources to negotiate multiple interconnection agreements and have had to rely on the pick-and-choose rules to establish interconnection agreements that meet their specific needs.

In most cases, facilities-based CLECs are desperately trying to move off the ILEC network, but will, for some time, still need facilities provided by the ILEC, especially last mile connectivity. The dirty, little secret that the ILECs do not want anyone to recognize is that the ILECs actually want everyone (wholesale and retail customers) on their network, just at a price at which it becomes irrelevant to the ILEC whether it provides the end-user retail service or the wholesale service to the CLEC. The ability to pick-and-choose is essential to enable small stand-alone facilities-based CLECs to fill out their networks and obtain access to only those essential components of the network they need to offer differentiated services via particular combinations of ILEC and CLEC facilities. Unless the Commission is content with a telecom market of "cookie-cutter" service offerings, opting into the agreements negotiated by larger carriers, such as AT&T or MCI, will not create the world of competitive offerings envisioned by the Telecom Act. Furthermore, a stand-alone CLEC will most likely be unable to avail itself of the

provisions agreed to by an AT&T or an MCI, with volume and term discounts and likely emphasis on mass market UNE-P access.

The Commission has asked commenters to describe any relevant experience requesting or provisioning network elements and services out of SGATs. ALTS member consensus is that the SGATs offer little of use to facilities-based CLECs. As a result CLECs have instead chosen to pick-and-choose more workable terms set forth in other parties interconnection agreements. Conditioning relief from the pick-and-choose rule on an SGAT requirement would not strike an appropriate balance among the competing policy interests at stake.

IV. Reversing the Pick and Choose Rule Will Not Provide Additional Incentive For ILECs to Fairly Negotiate With CLECs.

The Commission should not accommodate ILEC allegations that permitting requesting carriers to pick and choose provisions skews the individualized nature of interconnection and unbundling negotiations, and greatly magnifies the importance of each individual term of an agreement. CLECs have not sought the atomistic unbundling that the ILECs claim. Rather, ALTS seeks only what the statute demands: the obligation for the ILEC to "make available *any* interconnection, service, or network element provided under an [approved interconnection] agreement.[11]

Underlying the Commission's proposal to abandon its rationale for adopting the current pick-and-choose rule is the misguided assumption that ILECs now realize that they need and want CLEC wholesale customers to fill their excess network capacity and

that it would be foolish to neglect this avenue for gaining additional telecommunications revenues. If this were the case, however, ILECs would have enough incentive to negotiate more beneficial terms under the current regime and provide those terms to all CLECs in order to increase their wholesale business. Instead, the ILECs' strategy is clear – they would rather forgo any revenue from CLECs than accommodate a CLEC that might take away their retail business. It is obvious from the ILECs' posturing for the past seven years that they are not interested in creating a robust wholesale environment for their services. They have every incentive to impede competition, not fill their network with wholesale services.

Therefore, it is illogical for the Commission to abandon the pick-and-choose rules as currently formulated and sanctioned by the Supreme Court. At a time of so much regulatory and business uncertainty, the assurance that the original pick-and-choose rules, are legally sustainable is indeed a blessing to carriers needing to know what the bargaining rules are before executing business plans.

The ILEC arguments in this proceeding will, no doubt, be predicated upon the view that ILECs actually want CLECs as wholesale customers and that they will seek to provide products and services that CLECs want and that they will do so on terms and conditions that are mutually beneficial. This argument is patently absurd. Underlying this premise is the misguided assumption that the terms and conditions of current interconnection contracts are insufficient to provide incentive for ILECs to perform up to the level they are capable, and that additional incentives would encourage them to perform at higher levels.

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[11] Section 252(i); emphasis supplied.

ALTS submits that to the extent ILECs are able (and willing) to perform at higher standards, they should do so for all carriers on a nondiscriminatory basis, not on some subjective determination of which carriers are worthy of that higher level of service. Abandonment of the pick-and-choose rules would allow an ILEC to select its favored carriers, whether they be affiliates or carriers that do not pose a significant threat to the ILEC. It would allow ILECs to evade the core nondiscrimination requirements of Section 252(i). ALTS submits that the ILECs would use the opportunity to coerce CLECs into negotiating contracts that would be discriminatory to other carriers. Thus, some CLECs would gain preferential treatment while others would be left with sub-par performance.

Moreover, in many cases the individual CLEC would be willing to negotiate a carrier-specific contract because the burden of discrimination would not fall on its shoulders – it would fall on carriers that are not parties to the contract. The ILECs will no doubt argue that any similarly situated carrier could opt into the entire contract. It seems impossible to avoid inclusion of "poison pill" provisions that would make the agreements unappealing to other carriers. As indicated above, in the event that a party suggests a method that would avoid the "poison pill" scenario, ALTS would consider such proposals.

The opportunities for "greenmail" would also be increased if the ILECs were freed of the pick-and-choose obligation. That is to say, ILECs would offer more beneficial terms to CLECs that agreed to support certain regulatory actions by the ILECs. The Commission should not condone a process in which the ILECs could coerce CLECs

through threats and promises to accept a contractual arrangement that would almost certainly be discriminatory to CLECs outside of the arrangement.

CLECs need quality and timely performance at reasonable rates. Abandonment of pick-and-choose will not achieve this result. ALTS submits that adherence to the current interconnection negotiation/arbitration process, with the addition of performance metrics and standards and strict enforcement mechanisms would lead to such a result. Overhauling the current interconnection negotiation process would be disruptive and would create uncertainty as carriers wade through the new process, unsure how to best proceed and enforce their rights under the Act. The Commission should not stir up the interconnection process by abandoning its pick-and-choose rules, one of few rules that have withstood judicial scrutiny.

As stated above and as we are all too aware, the CLEC is still in the unenviable position of being the wholesale customer of a reluctant supplier that is also the CLEC's chief competitor. But for ILEC market power and control over essential bottleneck facilities, ILEC-CLEC interconnection agreements would undoubtedly include normal business rules with liquidated damages provisions. Virtually every contract between parties in any competitive industry includes such provisions. In fact, CLEC contracts with parties other than ILECs generally include such provisions. But the ILECs uniformly object to the inclusion of such metrics and penalty provisions in their contracts. Because the CLEC has no alternative supplier of wholesale facilities available to it, the CLEC often must accept the ILECs' terms as a condition of reaching agreement on the interconnection agreement. Until ILECs are compelled by natural competitive market forces to negotiate such ordinary business rules, the ILECs will continue to wield

overwhelming market power and control over bottleneck facilities. The FCC must ensure that CLECs may avail themselves of the pick and choose rules required by Section 252(i) in order to impose some constraints on the ILECs' currently insurmountable bargaining power with their chief rivals/wholesale customers.

CONCLUSION

For the foregoing reasons, the Commission should determine not to alter the pick-and-choose rules established pursuant to Section 252(i).

Respectfully Submitted,

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